

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To Be Argued On Appeal BY:
HAROLD NISNEWITZ, PRO SE

77-1106

B
P/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-1106

UNITED STATES OF AMERICA, Appellee

-v-

HAROLD NISNEWITZ, Appellant

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF AND APPENDIX
OF THE APPELLANT

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APPELLEE

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HAROLD NISNEWITZ,

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BRIEF OF THE APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1106

UNITED STATES OF AMERICA,

APPELLEE,

VS.

HAROLD NISNEWITZ,

DEFENDANT, APPELLANT

PRELIMINARY STATEMENT

I, Harold Nisnewitz, Pro Se, appeal the order entered in the United States District Court for the Southern District of New York on November 23, 1976, by the Honorable Richard Owen, United States District Judge, denying a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

The indictment, 74 Cr. 96, filed on January 30, 1974, charged that I, Harold Nisnewitz, along with Jose Ramos, Jr., and Thomas La Morte with conspiring to file false statements on loan applications to insured banks (count seven (7) of the indictment) and I was charged alone with six (6) counts of aiding and abetting the filing of false statements on loan applications with insured banks (count one to six), in violation of 18 U.S.C. § 371, 1014 and 2.

The trial of the indictment, 74 Cr. 96, began on May 1, 1974, and concluded on May 10, 1974. At the end of the trial I was found guilty by a jury on all counts charged in the indictment. Co-defendant La Morte was acquitted and defendant Ramos had plead guilty prior to the trial.

Up to and including this point, I was represented by H. Howard Friedman, Esquire, appointed pursuant to the Criminal Justice Act, because of my financial position.

At the same time two other indictments of a similar nature were pending before Judges Lasker and Gurfein. I requested the aforementioned judges to appoint new counsel, as I started to have the feeling Mr. Friedman to be incompetent. Mr. Friedman was relieved and David Brodsky, Esquire, of the firm of Guggenheimer and Untermeyer, was appointed to represent me. David Brodsky, Esquire represented me at the sentencing before Judge Owen and later on appeal, which this court denied and thereby affirmed the judgment of the lower court from the bench, 74-1971.

POINT I

THE DISTRICT COURT ERRED WHEN IT DENIED THE MOTION FOR A NEW TRIAL PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE. THE REQUIRED TESTS HAVE BEEN MET WHICH MERIT THE GRANTING OF THIS MOTION, BASED UPON:

A) Newly Discovered Evidence

In denying the motion for a new trial, the District Court erred. In addition to the grounds specified in the motion, it has come to my attention that David Brodsky, Esquire also faulted. Mr. Brodsky was appointed to represent me at the sentencing before Judge Owen and later on appeal before this court. On appeal, the judgment of the lower court was affirmed. Shortly thereafter, I was ordered to surrender to commence service of my sentence. After I surrendered, a motion for reduction of sentence was filed by Mr. Brodsky which the court, subsequently denied. At this point I was informed by Mr. Brodsky that he could do no more on my behalf and thus he would no longer represent me.

When conducting the research for this brief an error committed by Mr. Brodsky was uncovered. Mr. Brodsky at no point filed with the Court of Appeals for the Second Circuit a required motion, nor informed me of pro se procedures in order to file a petition for Writ of Certiorari to the United States Supreme Court, 11 A. Rule 5 (e) of the Federal Rules of Appellate Procedure states that

"If, after an adverse decision by the Court of Appeals, a review by the Supreme Court of the United States is to be sought, the appointed counsel shall, after communication with the appellant and if requested to do so, petition the Court for certiorari, unless upon proper motion filed within seven days after the entry of judgment with supporting papers indicating that such petition for certiorari would be wholly frivolous, counsel is relieved of that obligation by the court. If counsel is relieved, he shall within seven (7) days after such motion

is granted so advise the appellant in writing and inform him concerning the procedures for filing a petition for a writ of certiorari pro se...."

Prior to my incarceration, I met with Mr. Brodsky and he informed me of notification to Ms. Patricia Hynes, Esquire, the Assistant United States Attorney, who prosecuted the case for the Government, that a petition for certiorari would not be filed. No discussion of the matter between Mr. Brodsky and myself ever took place. In an attempt to adjourn the date of my surrender, Mr. Brodsky wrote to Judge Owen requesting additional time in order to file a motion for reduction of sentence. The Court denied said motion. The letter, which appears in the appendix page(14 A), informed the court that a petition for certiorari would not be filed. I was never informed as to my right to petition the Supreme Court according to Rule 5 (e) of the procedures, for review due to the error of Mr. Brodsky.

In addition to the error committed by David Brodsky, Esquire, the representation offered me by H. Howard Friedman, Esquire appointed pursuant to the Criminal Justice Act, was complete incompetence. Upon reviewing the trial transcript, serious errors were disclosed which brought about my conviction and subsequent incarceration.

Rule 33 of the Federal Rules of Criminal Procedure authorizes that

"The court on motion of a defendant may grant a new trial to him if required in the interest of justice...A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two (2) years after final judgment..."

In order to satisfy the requirements of the rule, it is necessary to prove that the evidence is "newly discovered." In Johnson vs. the United States, 32 F 2nd 127, 130 (8 cir., 1929), certain tests were elaborated in order to determine whether a motion of this kind should be granted. The court held:

"That a new trial should ordinarily be granted because of newly discovered evidence is extremely elementary. But here again

are required preliminary showing of diligence and other vital elements. There must ordinarily be present and concur five (5) verties, to wit: (a) the evidence must be in fact, newly discovered, i.e., discovered since trial..."

As a layman who was never involved in a criminal prosecution it was impossible for me to have known of the procedures which transpire and whether my attorney was performing in a competent manner. It was only by carefully examining the trial transcript, after my incarceration, that the incompetence of court-appointed counsel came to be evident.

In United States v. Bertone, 249 F. 2nd. 156, 158 (3 cir. 1957), the court considered the question as to what is newly discovered evidence within the meaning of Rule 33. The argument advanced by the government contended that the motion was not based upon newly discovered evidence

"but asserted only trial errors and matters which were known by the defendant at the time of trial."

There was no way that I could have known about the competence or, in this instance, lack of competence of my court-appointed counsel. As a layman, I had no knowledge of legal procedures and as anyone in my situation would have done, I followed the instructions of my attorney implicitly. Further, in Pitts v. United States, 263 F. 2nd. 808, 810 (9 cir., 1959), Judge Matthews, upon consideration of a case in which the District Court denied a motion for a new trial asserted that the motion in this instance did not meet certain requirements:

"First, it did not appear from the motion that the evidence relied on was discovered after the trial of this case. It therefore did not appear from the motion that the evidence relied on was in fact, newly-discovered."

Unlike Pitts, it was not possible for me to have known or acquired such evidence during the trial.

In United States v. Smith, 331, U.S. 469 (1947) the Supreme Court, upon consideration of Rule 33, stated that

"New trials, however may be granted for error occurring at the trial or for reasons which were not part of the court's knowledge at the time of judgment." at 475

In this case, I was not aware of errors committed by my attorney during the trial since I am a layman and did not know of such matters. Further, in *United States v. Granger*, 504 F. 2nd. 585 (9 cir. 1974), the court, an unanimous opinion upon review of the denial of a motion for new trial by the District Court, said with respect for the trial record that:

"A review of the record clearly discloses that the evidence relied upon by the appellant was not newly discovered and unknown to the defendant at the time of trial."

Here again, the entire matter is centered upon the question as to whether the evidence was known to the defendant at the time of trial. Since Mr. Friedman was appointed by the court to represent me and is a member of a panel of attorneys under the supervision of a Judge, there was no reason for me to suspect that he was not qualified and would not defend me in a competent manner. As Mr. Friedman is an officer of the Court and a member of the bar, any layman would take this as prima facie evidence that he is competent.

B) Due Diligence on the Part of the Movant.

As required under Rule 33, to merit the granting of this motion, the defendant must show the court that he exercised "due diligence." As elaborated in *Johnson v. United States*, 32 F. 2nd, 127, (8 cir. 1929)

"(b) facts must be alleged from which the court may infer diligence on the part of the movant;"

Further, in *Reno v. United States*, 340, F. 2nd., 307 (5 cir. 1965), the court, commenting on what is in fact a showing of due diligence held that

"In the first place, there was no showing that the new evidence could not with diligence have been discovered and presented at trial..."

As previously stated, the entire case at bar revolves around the incompetence of court-appointed counsel. In *Holmes v. United States*, 284 F. 2nd., 716, 720 (4 cir. 1960), Judge Haynsworth held that with respect to newly-discovered evidence:

"Here, however, we have held that the newly-discovered evidence does warrant a new trial. The applicable standards in reaching that determination are not those which would govern our decision if the new evidence bore upon the substantive issue of guilt. It bears instead upon the integrity of the jury's verdict in the completed trial. Since, in every sense, the evidence was newly discovered after the trial and is of such character that under the applicable standards it fully supports a timely motion for a new trial, the motion, procedurally, should be classified as one based upon the newly discovered evidence which, alone, supports it."

Further,

"When the newly discovered evidence bears upon the substantive issue of guilt, we are necessarily concerned with its admissibility upon a subsequent trial and its probable effect upon the result of that trial. When, however, it bears upon the integrity of the earlier trial, we apply a different set of standards to determine its sufficiency to support a timely motion. Whether the evidence warrants a new trial for the one reason or for the other, when it is newly discovered after the trial, it is governed by the two-year limitation." (emphasis added)

The key word as stated by Judge Haynsworth is "integrity." The representation by Mr. Friedman questions the integrity of the trial.

(C) The Evidence Relied Upon Is Not Merely
Cumulative or Impeaching.

The evidence put forth in the motion before District Judge Owen and now before this court is not just of a nature that it can be said to be "merely cumulative or impeaching." Here again, *Johnson v. United States*, 32 F. 2nd., 127 (8 Cir. 1929), is of importance as another basic element necessary to the consideration of such a motion as expressed.

The evidence which will be presented in Point II of this brief will show inconsistencies in trial testimony, the lack of preparedness of a defense by counsel, and errors committed by him before, during and after the trial, which fully dispute the contention that the evidence is only cumulative and of an impeaching nature. In reality, almost no defense was presented on my behalf by my court-appointed counsel.

The evidence is not cumulative as it is not of a nature upon which it can be said that as a whole it casts doubt upon the integrity of the trial and the verdict which resulted. Each piece of evidence viewed separately and distinctly from any other, proves that the poor representation offered by counsel in each instance was responsible for the verdict of guilty to be returned by the jury.

With respect to the claim that the evidence is impeaching, when each document, incident or part of the trial record is examined separately, it indicates that this claim is invalid. The evidence does more than to merely impeach; it indicates inconsistencies in testimony, which in one instance in particular amount to perjury.

(D) The Evidence Is Material To The Issues Involved.

The evidence submitted in the motion before Judge Owen and now before this court is material to the issues involved. As to what is meant by material to the issues involved, the court said in *United States v. De Voe*, 493, F. 2nd., 776, 780, 781 (5 cir. 1974)

"What must be evaluated, however, are the requirements that 'the new evidence (must) be material and such that, if presented to a jury at a new trial, would probably produce an acquittal.'" *Shuler v. Wainwright*, 341 F. Supp., 1061, 1069 (M.D. Fla. 1972). Recently this last element was mentioned in *Ross v. Texas*, 474, F. 2nd., 1150 (5 cir. 1973):
...In our estimation, the likelihood of changing a jury's decision as a result of newly discovered evidence must rise

considerably above the level of speculation. Otherwise, finality would be a vanishing element from all judgments of conviction in criminal cases." 474 F. 2nd., at 1153

The evidence presented to the District Court showed how counsel failed to conduct a competent defense of his client. By virtue of almost no pretrial preparation, counsel was not prepared for what took place during the trial. As stated in De Voe, if a new trial was granted this evidence upon presentation to the jury should produce an acquittal. In the case at bar, the showing of incompetence of counsel to the jury would not produce an acquittal, but by showing how counsel failed to provide a competent defense, the verdict would not be one of guilt. Since my attorney conducted a very limited pretrial investigation, he was not prepared to spot inconsistencies in testimony as they arose. If a new trial is granted, counsel conducting such an investigation would be completely aware of all the facts of the case and thus could conduct a competent defense.

(E) On Retrial An Acquittal Would Probably Result.

Should a new trial be granted, I am convinced that an acquittal would result based on the evidence submitted with respect to the testimony of government witnesses. As to the consideration of such evidence and the end result at another trial, it must be borne in mind that the evidence must be examined as though it is not cumulative, thus each piece is separate and distinct from the other.

In *Estes v. United States*, 254 F. Supp. 314, 326 (U.S. D.C., W.D. Texas, El Paso Division, (1966), the court said:

"The conclusion as to whether newly discovered evidence would likely produce a different result on a new trial must be reached by an evaluation of such evidence, not just in and of itself on a unit or cumulative basis, but in the light of the entire

record made in the trial on the merits and in the hearing of the motion for a new trial..." (emphasis added)

Here the court stated that the evidence should not be evaluated "on a unit or cumulative basis, but in the light of the entire record." By this, the District Court, in considering the motion, should have looked at the entire record of the trial in light of the issues raised in the motion. In this respect the function of the trial judge, who presided at the original trial, is of utmost importance.

In *United States v. Miller*, 277 F. Supp. 200, 209 (U.S. D.C., Conn. 1967), the court said with respect to the function of the trial judge:

"The trial judge sits as the thirteenth (13) juror. *Applebaum v. United States*, 274 F. 43, 46 (7 cir. 1921). See also 4 W. Baron, *Federal Practise and Procedure* §2281 (Rules ed. 1951). He may 'utilize the knowledge he gained from presiding at the trial as well as the showing made on the motion.' *Brain v. United States*, 333 F. 2nd., at 724."

In this instance the District Court did not give the motion the required consideration as elaborated in *Miller*. Further, in *United States v. Kelly*, 119 F. Supp. 217, 219 (U.S. D.C., D.C. 1954), with respect to the duty of the judge who tried the case, the opinion is quite similar to that of *Miller*.

"On a motion for judgment of acquittal, the court must determine whether upon the evidence, giving full effect to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of facts, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *Battle v. United States*, 1953, 92 U.S. App. D.C., 220, 206 F. 2nd 440.

While in *Kelly*, the court had to rule on a motion for acquittal, the criteria used by the judge should be the same as when ruling upon a motion for a new trial. What would a "reasonable mind" find if confronted with the facts of the case at bar.

I am convinced that if a new trial is granted, with the assistance of competent counsel an acquittal would result. Counsel due to his lack

of preparation, caused government witnesses to give testimony that in most instances should have been harmless. However, since my counsel did not follow up on these responses, they were detrimental to me. In several instances a witness uttered a remark that Mr. Friedman could have used successfully to attack his credibility, but did not. The comments brought out by Mr. Friedman would have been harmless if it would have been shown to the jury that credibility was the issue. Mr. Friedman questioned the witnesses, he changed the subject of the cross-examination and did not follow through important matters.

(F) The Interest of Justice.

In addition to newly discovered evidence the motion filed with the District Court contended that a new trial should be granted "in the interest of justice." The evidence alleged that a grave injustice had been committed. Testimony of government witnesses and the incompetent representation afforded me by my court-appointed counsel should have convinced the lower court that the conviction was obtained by virtue of numerous errors that culminated in an unjust end.

In *Walcher v. United States*, 233 F. 2nd. 748, 749 (9 cir. 1956), the court states with respect to consideration of a denial of a motion for a new trial:

"We approach the consideration of this appeal with the thought in mind that, "a trial judge's order denying a motion for a new trial on appraisal of newly discovered evidence should remain undisturbed 'except for most extraordinary circumstances.'" *United States v. Johnson*, 327 U.S. 106, 111, 66 S. Ct. 464, 466, 90 L. Ed. 562." (emphasis added)

I submit that the case at bar meets the requirements of "extraordinary circumstances." My reasons for undertaking this appeal are two-fold. First, to secure an acquittal, so that I will establish my innocence and second, to prevent the revocation of my public accounting license in the State of New York. In the absence of this license, I cannot adequately

support myself and my family. The situation is now more serious by virtue of the fact that my incarceration plunged myself and my family into additional financial distress.

Further, with regard to a miscarriage of justice, the Court in *United States v. Smith*, 179 F. Supp. 684, 686, 687 (U.S. D.C., D.C. 1959), held that

"if there has been a miscarriage of justice, it should be rectified irrespective of any technical obstacles and that is the usual view of this court where substantial rights are involved. At the same time it must be borne in mind that the granting on a new trial is a very serious matter." (emphasis added)

Aside from the miscarriage of justice that resulted, the problem of the public interest must also be kept in mind.

"The public interest must always be born in mind. The best guide that this court finds in this respect is an expression of Mr. Justice Cardozo, in *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97 at page 122, 54 S. Ct. 330 at page 338, 78 L. Ed. 674, where the great jurist stated:

"...justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

But on the other hand

"Consequently the public interest must always be considered on a motion such as is presented here. It does not mean of course, if the court finds that there is a reasonable probability that there has been a miscarriage of justice that such a motion should not be granted. (emphasis added)

When deciding upon such a question, here again the importance of the District Judge who tried the case, cannot be taken lightly. In *United States v. Parelus*, 83 F. Supp. 617, 618, 622 (U.S. D.C., D. Hawaii, First Division, (1949) the court said that

"If the judge sits as a thirteenth juror, as some authorities hold, then a verdict in which he could not concur should not stand if it is properly moved against. In any event he should

act in preventing injustice when deliberated discretion prompts such act. " (emphasis added)

As the court further observed:

"...it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." (emphasis added)

Further

"To the Federal Trial Judge the law gives ample power to see that justice is done in cases pending before him; and the responsibility attendant upon such power is his in full measure." (emphasis added)

In short, the District Court should have granted a new trial in the interest of Justice. Judge Owen, who presided at the trial, was in the position to be able to observe first hand what had transpired. The aforementioned discussion points out the importance of the judge seeing to it "that justice is done." In this instance justice could only be done by ordering a new trial, as the District Court should have critically reviewed what took place during the trial.

Based upon the aforementioned, the decision of the District Court should be reversed and the case remanded back to the District Court.

POINT IIINCOMPETENCE OF COURT-APPOINTED COUNSEL
HAS BEEN PROVED BEYOND A REASONABLE DOUBT.

The motion for a new trial contended that my conviction and subsequent incarceration was due to the incompetent representation afforded me by my court-appointed counsel which the District Court subsequently denied. After my indictment, I requested that the court appoint counsel because of my financial position. Judge Lasker, who presided at the arraignment, appointed H. Howard Friedman, Esquire, pursuant to the Criminal Justice Act.

The quality of the representation afforded me by Mr. Friedman was poor due to the fact that almost no pretrial preparation or investigation was undertaken on his part. As stated in the motion for new trial, the voucher submitted by Mr. Friedman to Judge Owen for payment of his services indicates his failure to perform what was required (46A).

For example, the amount of hours claimed in the voucher for interviews and conferences is not correct. At no time did I have seven (7) hours of conferences with him as he asserted. Letters which Mr. Friedman sent to me arranging two appointments were submitted as exhibits with the motion to Judge Owen. (47A, 48A)

As to Mr. Friedman's contention of obtaining and reviewing records, his claim of three (3) hours is not justified. Aside from requesting me to bring him all records in my possession, of which I had very little, at no time did said attorney make any effort to acquire any documentation on his own.

With respect to ten (10) hours claimed for legal research and brief writing, the claim is invalid. At no time did Mr. Friedman make any formal motions or file briefs with the court on my behalf.

Based upon the aforementioned, as evident in the voucher filed by said counsel, the court recognized his claims as not truthful and reduced his over-all fee for legal services from a total of \$2,020.00 to \$1,000.00. In reducing Mr. Friedman's voucher for services rendered, the District Court had recognized his untruthfulness and lack of preparation of my defense. If claims to services rendered were valid the court would not have reduced said attorney's fee. It is therefore clear that as to pretrial preparation, little, if any were done, which the court acquiesced and acknowledged by reducing the fee of said counsel. It is evident to me since the District Court, seeing incompetency and negligence on the part of my counsel, reduced the fee by more than 50%. This point will be elaborated further in reference to the cross-examination by Mr. Friedman of government witnesses; especially that of Ramirez.

During the trial, the performance of my counsel can only be described in terms of a continuous comment he kept repeating, both in my presence and in that of my wife; "I forgot." My counsel requested of me that I take diligent notes during direct and cross-examination of witnesses of which he possibly use later to aid in my defense. As inconsistencies were brought out by me, to his attention he responded that they would be pursued by him, since they were relevant and important to my defense and would be acted upon during the next session of the court. However, no action was taken because, as Mr. Friedman repeatedly stated, "I forgot."

An attorney appointed to represent an indigent defendant is an officer of the court. By virtue of this appointment, as stated by the court in Williams v. State, 197 So. 562, 565 (1940):

"The attorney being an officer of the court and when by the court appointed to represent, professionally, an indigent person charged with a felony, it then becomes his duty to render faithful

and effective professional services so that the courts may so function that the legal rights of an indigent defendant may be determined and justice administered according to law. These obligations rest on an attorney as an officer of the court, regardless of the enemies or the friends made by counsel while discharging his professional duties in the trial of a case before the courts." (emphasis added)

These words cannot be taken lightly. As an officer of the court, counsel is required and expected to perform in a competent manner so that justice may be administered correctly by the courts. Especially when counsel is court-appointed, he is expected to perform his required duties in an "efficient professional manner."

In the case at bar, Mr. Friedman is a member of a panel of attorneys specifically empaneled to represent the indigent, implying said counsel would defend me in a vigorous and competent manner. Since attorneys, who are members of this panel must also be members of the bar, there was no reason for me to doubt that Mr. Friedman would not defend me in a competent manner. But to my regret and complete surprise, this did not happen.

In United States v. Hack, 205 F. 2nd 723, 727 (7th cir. 1953), the court said with respect to claims of incompetence of counsel made by those who are convicted

"We assume that most defendants who are convicted usually find fault with the attorneys who defend them at their trial."

Along with this claim, the problem of mistakes must be considered as elaborated in Burton v. United States, 151 F. 2nd., 17, 18, 19 (CA D.C. 1945)

"There are few trials free from mistakes by counsel... Here the appellant selected his counsel and made no objection to his conduct of the case during trial... This is not to deny that a defendant's right may be so flagrantly disregarded by counsel of his own choosing, and, as a consequence, justice so manifestly miscarry that a new trial should be ordered." (emphasis added)

Mr. Friedman was appointed to represent me by the Court. As compared to Burton, I had no choice in the selection of counsel. But as recognized by the court, retained counsel is also expected to perform competently. I was assigned an attorney and assumed, based upon the procedures undertaken by the court, that he was qualified.

The right to counsel is one which the courts have always observed as extremely important with respect to the administration of the criminal justice system. The Supreme Court stated in *Powell v. Alabama*, 287 U.S. 45, 69 (1932)

"Historically and in practise in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel."

Further

"The (defendant) requires the guiding hand of counsel at every step in the proceedings against him."

The motion filed in the District Court alleged that by virtue of an examination of the trial record after my incarceration, the incompetence of court-appointed counsel became evident. As stated in the motion, the trial transcript served to indicate my belief that counsel was incompetent in my defense. With respect to such claims in *Harshaw v. United States*, 542 F. 2nd. 455, 456 (8 cir. 1976), the court stated that

"To support an allegation of ineffective counsel the record must contain some indication that counsel was or may have been incompetent, i.e., that counsel failed to perform some essential duty and that the defense was prejudiced thereby." (emphasis added)

With respect to Mr. Friedman and his representation, "the record" in this instance, is the trial transcript. Numerous inconsistencies in

testimony on the part of government witnesses and the overall manner in which counsel performed, support the claims which I alleged in the motion to the District Court. In particular, as I contended almost no pretrial preparation or investigation on my behalf was conducted by counsel. This failure on the part of counsel has been recognized by the courts. In *United States v. Thompson*, 475 F. 2nd 931 (CA D.C., 1973) it was asserted that

"The failure to investigate or to call particular witnesses surely may amount to ineffectiveness of counsel in certain circumstances."

Again, with respect to pretrial preparation, the Eighth Circuit Court of Appeals in *McQueen v. Swensen* 498 F. 2nd 216 (8 cir. 1974) stated that

"(T) he mere appointment of counsel, no matter how able, for a defendant charged with a crime without opportunity to consult, advise or to make such preparation for arraignment and trial as the facts of the case fairly demand would be a travesty and would not satisfy the requirements of the Fifth and Sixth amendments. (*Maye v. Pescor*, 162 F. 2nd 641, 643 (8 cir. 1947))" (emphasis added).

In contrast to the above mentioned, the Supreme Court considered the importance of the ability of counsel and its relationship to the defense of a client. Mr. Justice Rehnquist, speaking for the court in *Tollett v. Henderson*, 411 U.S. 258, 267, 268 (1973) stated that

"The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract nor his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law."

While the aforementioned is true in many respects Justice Marshall, with whom Justice Douglas and Brennan were joined by in a dissenting opinion stated that

"In the end, the court, seems to adopt, a concept of professional responsibility that I cannot accept..It would let an attorney 'advance' the interest of his client without even informing himself about the facts underlying a constitutional challenge so that he might inform the client about the way in which the attorney's professional judgment, the course he is taking in fact advances those interests. '(F) aithful representation of the interests of his client's ante, at 268, 36 L. Ed. 2nd at 244, means, I believe that an attorney must consult with the client fully on matters of constitutional magnitude. Without such consultation, the representation of criminal defendants becomes only another method of manipulating persons in situations where their control over their lives is precisely what is at stake." at 272-273. (emphasis added)

The dissent of Mr. Justice Marshall must not be taken lightly, as in the case at bar the lack of preparation and consultation with a client is the key element that I believe led to my conviction and subsequent incarceration. Aside from two (2) visits with my attorney in his office prior to trial, I had no other conversations with him. I find it hard to believe how counsel, on the basis of these two conferences and his failure to conduct any investigation could prepare an adequate defense. These contentions, I submit are further substantiated by the fact that the District Court reduced the fee of said attorney, as seen from the voucher he submitted.

In United States v. De Coster, 487 F. 2nd 1197, 1202 (CA., D.C. 1973), the court applied strict guidelines with respect to the required duties of counsel and what is effective assistance of counsel

"This court does not sit to second guess strategi and tactical chances made by trial counsel. However, when counsel's choices are uniformed because of inadequate preparation is defendant is denied the effective assistance of counsel."

"The effective assistance of counsel is a defendant's most fundamental right for it affects his ability to asserts any other rights he may have. The Supreme Court has observed, 'if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.'" (Emphasis added)

Further

"effective assistance, like the right to counsel itself, derives

not only from the due process clause, but from Sixth Amendment's 'more stringent requirements.' Consistent with this recognition the court has continued to repeat that the purpose of counsel is to 'preserve the adversary process and that counsel must act' in the role of an active advocate in behalf of his client." at 1202 (emphasis added).

The court in De Coster went further and elaborated detailed standards:

"Accordingly we adopt the following standard: a defendant is entitled to the reasonably competent assistance of an attorney as his diligent conscientious advocate." at 1202.

"Since reasonably competent assistance is only a short hand label, and not subject to ready application, we follow the approach adopted by the Fourth Circuit and set forth some of the duties owed by counsel to a client."

"In general-counsel should be guided by the A B A standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases."

"Specifically-(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense as to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client."

"(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action." at 1203.

"Counsel must conduct appropriate investigation, both factual and legal to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that 'all available defenses are raised' so that the government is put to its proof. This means that in most cases a defense attorney, or his agent should interview not only his own witnesses but also those the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and all law enforcement authorities. And of course, the duty to investigate also requires adequate legal research." at 1204.

The court further asserted that

"If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government is, 'on which is cast the burden of proof once a violation of these precepts is shown can establish lack of prejudice thereby.'"

"Much of the evidence of counsel's ineffectiveness is frequently

not reflected in the trial record (e.g. a failure to investigate the defendant, or a witness before trial). As a result, ineffectiveness cases have often evolved into tests whether appellate judges can hypothesize a rational explanation for the apparent errors in the conduct of trial." at 1204 (emphasis added)

Due to the lack of pretrial investigation and preparation on the part of counsel, he did not move to dismiss the indictment on the grounds of improper venue. In effect, since counsel, as evident in the voucher, (46 A) did not conduct extensive pretrial preparation and investigation, he did not even know if a venue problem existed. This failure on the part of my counsel was not made an issue when David Brodsky, Esquire prosecuted an appeal on my behalf to this court.

At no time did Mr. Brodsky discuss with me the grounds for appeal of my conviction. When present at his office, I mentioned to him that in my opinion Mr. Friedman was incompetent. He responded by saying that it would be hard to establish incompetence and no further discussion of the matter ensued.

A short time thereafter, I received a copy of the brief and appendix which Mr. Brodsky submitted to this court on my behalf. As I stated he did not discuss possible grounds for appeal with me, but just took it upon himself to write the brief and file it with this court. While as a layman I am not versed in the law, there is no reason why he should not have discussed the grounds for appeal with me.

To sum up, the conviction resulted from the incompetent representation of Mr. Friedman, but by Mr. Brodsky not using this as a ground on appeal and not discussing the appeal with me, it just added to the mistakes made and continued the compounding of errors and this did not help me in any way whatsoever.

With the respect to the conduct of counsel during the trial, he informed me that I would not be called as a witness to testify on my own behalf. Instead, he stated that he would put my wife on the witness

stand. Because of this she was forced to remain out of court throughout most of the proceedings. Mr. Friedman stated that the next day in court I would testify. If Mr. Friedman had put my wife on the stand, I submit that my defense would have been greatly improved. Since she assisted me in my office, she would have been an excellent witness on my behalf. Here again, if Mr. Friedman would have prepared adequately before trial and made himself cognizant of these matters and facts he would have seen the advantage of putting my wife on the stand instead of me.

As I have mentioned, by virtue of almost no preparation before or during the trial, said trial amounted to a travesty of justice. Inconsistencies by government witnesses were never pursued in court by my counsel. In one instance, a government witness, upon cross-examination by Mr. Friedman, proved that when another government witness perjured himself, the point was not pursued any further. In the indictment, 74 Cr. 96, count two (2) alleged that Roger La Ferla "earned additional income of \$3,500.00 as a carpenter," which was contended to be a false statement. Upon direct examination by the government, the witness was asked about his occupation, and he admitted that he was a carpenter.

82 A (Tr. 374) lines 21-24, is as follows:

DIRECT EXAMINATION

BY MS. HYNES:

Q Mr. La Ferla, what do you do for a living?

A I am a carpenter.

Upon cross-examination by my counsel, the witness was again questioned as to his occupation, 83 A (Tr. 410-411), lines 15-15 as follows:

Q Going back to your grand jury testimony of August 14, 1972, page 8, Ms. Hynes, do you recall being asked about going to Mr. Nisnewitz' office in Queens and you were asked this question, "You went by yourself?"

A Myself and Robert Walther."

A Yes.

Q Do you remember that question and that answer?

A Yes.

Q Now you said you are a carpenter, are you not?

A Yes.

Q Did you have knowledge of carpentry back in February of 1972?

A No. I just started as a carpenter recently.

Q Where are you employed now?

A By a man in East Northport, Tomack Road, private contractor.

Q And are you doing carpentry work there?

A Yes.

Q Who suggested that you put down on this application that you are a carpenter?

A Mr. Nisnewitz.

Q You didn't tell him you were a carpenter?

A No.

Q And that this was a side line?

A No.

The witness, upon questioning, said that he did not tell me he was a carpenter. He said that. I myself suggested it for the loan application. This can be seen as perjury on the part of the government witness. If the witness did not volunteer such information, I could not have come to know it. There is no possible explanation except that of perjury.

Further, the government produced two witnesses, Mr. & Mrs. Walther, to substantiate the testimony of Mr. La Ferla. 85 A (Tr. 442) lines 10-16, which is as follows:

Q How long did you know him?

A I don't know. About a year.

Q During the year that you knew Mr. La Ferla was he working?

A Off and on as a carpenter, most of the times off.

Q But he was a carpenter, wasn't he?

A That what he liked to do.

Mr. Walther was asked as to how long he knew Mr. La Ferla and he replied about one year. As to his occupation, he said that he worked off and on as a carpenter and further stated, "that what he liked to do." As previously mentioned on Tr. 442, line 16.

With respect to the testimony by Mrs. Walther, 86 A (Tr. 453), line 6-25, Mr. Friedman cross-examined the witness in terms of how long she knew Mr. La Ferla.

Q Was Mr. La Ferla working in 1972?

A No, he was not.

Q Was he a carpenter?

A He did carpentry work but he wasn't employed at that time.

Q How long do you know Mr. La Ferla?

A I have known Roger ten (10) years.

Q You know that he is a carpenter?

A Yes.

Q And he was a carpenter in 1972, February?

A No, he wasn't working.

Q I Understand that but he told us that he was employed as a carpenter then.

A No, I didn't say that. I said I know that he is a carpenter. But, he wasn't employed at the time.

Q Do you know whether he knew carpentry back in February of '72?

A Do I know if he was --

THE COURT: If he knew carpentry.

A Yes, he did. He took it in high school.

In the cross-examination, as stated above, Mr. Friedman cross-examined the witness in terms of how long she knew Mr. La Ferla. She stated

that he was a carpenter for ten (10) years. She was asked whether La Ferla knew carpentry back in 1972. She responded, "yes, he did. He took it in high school." In this instance, the testimony of Mrs. Walther, completely contradicts that of Mr. La Ferla. Mrs. Walther admitted, under oath, knowing Mr. La Ferla for ten (10) years and that he studied carpentry in high school.

On page 410, lines 15-25 and on page 411, lines 3-15 as heretofore enumerated, Mr. La Ferla, while being cross-examined, was asked if he knew carpentry back in February, 1972 and he responded, no, that he just started recently. As evident with the testimony of Mrs. Walther, the witness lied. He had known carpentry for the past ten (10) years. "He took it in high school." (tr. 453, line 25).

This point, brought out by Mr. Friedman was never pursued by him with respect to the inconsistent testimony of the witness, La Ferla. He did not take any action to expose or point out these inconsistencies, of which the second count of the indictment was based upon.

Upon cross-examination of government witness Rowe, my counsel made a serious error and/or blunder by questioning the witness on a statement which had not even been entered into evidence. 59 A (Tr. 123-128) as follows:

Q Mrs. Rowe, I have asked you to read the paragraphs on this page, May 2, 1972 statement that you have given to the FBI Agent Hackbart. Does this refresh your recollection as to what you told Mr. Hackbart on May 2nd, 1972 as to when you had a cold?

A I know I had it the second time when I went to the bank.

Q Does this statement, Mrs. Rowe, state that you had a cold on the first time you went to the bank?

A No, I did not have a cold on the first time.

Q I am not asking whether or not you did. I am asking you whether

this statement that you have signed on May 2nd, 1972 refreshes your recollection, or whether it does say that you had a cold the first time you went to the bank.

THE COURT: THE question is objectionable in form. I will sustain the objection on the grounds of form.

Q Mrs. Rowe, you showed your Social Security card to the bank loan officer the first time you went to--

A Yes.

Q May I ask you to read the end of the paragraph on the next page of the May 2nd, 1972 FBI report?

A Which page? The next page?

Q The very next page. It states "The Social Security card."

A Yes, it is about the Social Security card."

Q That was the card that you showed the bank officer the first time you went?

A The first time I went, I showed him the Social Security card.

Q And that is the same paragraph wherein you state that you had a cold?

A No, that was the--well, I don't know.

Q Yes or no?

A The first time I showed him the Social Security card, because they need it for the Id on the loan application.

Q I am asking you about the statement you made to FBI agent Hackbart.

THE COURT: What are you asking her, Mr. Friedman?

Q Did you not state to agent Hackbart that you had a cold at the time that you went to the bank for the first time and showed the loan officer your Social Security card?

A The first time I did not have a cold.

Q I am asking you whether the statement says that or not.

MS. HYNES: Objection.

THE COURT: YES, I will sustain it.

Would come to the side bar, please.

(At the side bar.)

THE COURT: It seems to me if it is your contention this is a contradictory paragraph, why don't you offer the paragraph in evidence?

MR. DRESCHER: He wanted to read it and he was stopped by objection.

MR. LAWYER: Because it it not in--

THE COURT: Even asking her what does the statement say, well the statement is--

MR. FRIEDMAN: She is obviously--

THE COURT: The statement is the best evidence.

MR. FRIEDMAN: She is obviously not asking me--

MR. LAWYER: You are obviously not asking the question properly.

THE COURT: If it is your contention that this paragraph you have been referring to is a contradiction of her testimony, I would allow you to put that paragraph in evidence and argue such inferences as you feel are appropriate.

MR. LAWYER: But in the proper form. He can ask her--

THE COURT: I am only ruling on that narrow question to the witness. Questions to the witness I will rule upon as put.

MR. FRIEDMAN: Let's get this straight. If I put in this paragraph, I am offering the whole exhibit?

THE COURT: No, I don't think you are.

MR. FRIEDMAN: Is the government then permitted to put the balance of the statement in?

THE COURT: They would be permitted to put in anything that bears upon this paragraph.

MR. DRESCHER: To explain it away but nothing else/

THE COURT: YES.

MR. DRESCHER: All right.

(In open court).

MR. FRIEDMAN: If your Honor pleases, at this time the defendant will offer into evidence that portion of the May 2nd, 1972 statement by Mrs. Rowe to the Federal Bureau of Investigation, starting with "When I went the second time, I couldn't go" on the second paragraph.

MS. HYNES: I object to the reading at this time, your Honor.

THE COURT: In other words, beginning with the middle paragraph, which starts out "when I went" and going to the next two paragraphs?

MR. FRIEDMAN: Yes.

THE COURT: That paragraph and the following one?

MR. FRIEDMAN: That is correct, your Honor.

THE COURT: Ms. Hynes, do you have any objection to the introduction of those two paragraphs?

MS. HYNES: I consent, your Honor.

THE COURT: All right, they may be received.

MS. HYNES: Can we read them at this point into the record?

MR. FRIEDMAN: May I read these paragraphs into evidence at this point?

THE COURT: You may. You may read them to the jury.

Mark the exhibit appropriately at this point.

(Defendant Nisnewitz Exhibit A marked and received in evidence.)

THE COURT: Let us please number the page that has been admitted and make appropriate notation on the face of the exhibit, the paragraphs that are included in my ruling.

MR. FRIEDMAN: This would be the third page.

THE CLERK: All of page 3?

MR. FRIEDMAN: No, beginning with "When I went the second time."

THE COURT: Mr. Friedman, you may read.

MR. FRIEDMAN: Thank you, your Honor.

"When I went the second time, the application was in an envelope. He told me to go to the First National Bank on Broadway, near Canal or

Centre Street. He told me to go in the bank and give it to anyone who takes loan applications. This I did. I went to one of the loan-takers at the bank. The man I talked to asked me or asked how my cold was. I wondered how he knew I had a cold. The banker asked if I had any identification. I said I only had a Social Security card. I said that I had no other identification under my maiden name."

Q Did anyone at the bank ask you for money?

A No.

In essence, my attorney questioned the witness about the document even before entered into evidence and then it was asked by the Court as to what he was questioning the witness about. I refer also to Mr. Lawyer, the Assistant United States Attorney, who made the statement, regarding Mr. Friedman's question to the witness, "you are obviously not asking the question properly." (Tr. 125, lines 23-24). Counsel for the government pointed out to my attorney that he was not asking the question properly. This shows that in addition to the court, the government recognized the inept ability of Mr. Friedman as not being able to cross-examine a witness properly and pointed it out at the side bar.

In Moore v. United States, 432 F. 2nd 730, 737 (3 cir. 197) the court stated that:

"It is possible to examine the sufficiency of his preparation and the adequacy of his knowledge of the relevant law."

Further

"It has been said that a claim that the defendant was denied due process of law requires a showing that counsel's representation was 'so lacking in competency or good faith that it would become the duty of the trial judge or the prosecutor as officer of the state to observe and correct it. For in such a trial the defendant would be practically without representation and it would therefore be a farce and a mockery of justice.' U.S. ex rel Darcy v. Hardy 203, F. 2nd 407, 427 (3 cir. 1953)." (emphasis added).

Here, both the court and the prosecution pointed out Mr. Friedman's incompetence and tried to correct it.

Again, while the government witness Rowe was being cross-examined by co-defendant's counsel, Mr. Drescher, a controversy arose as to the existence of a money order. The witness could not establish where the money order was purchased. She could not identify the name of the issuing company of the money order. The witness did not have a receipt of the said money order. She could not tell who the recipient of the money order was. The government did not produce said money order as evidence and enter it into the record. During his cross-examination, Mr. Friedman made no objection on the part of these questions put by Mr. Drescher, which can be seen as prejudicial to my defense. Since the money order was never produced by the government and since there was no evidence of its existence, the questioning in relation to a document, which in essence might have been a figment of the witnesses' imagination, hearsay, which could not be substantiated. 65 A (Tr. 132, line 21, page 134, line 6).

CROSS-EXAMINATION

BY MR. DRESCHER:

Q Miss Prenclau, this \$50 money order, when did you buy it; when you got your money at the First National City Bank?

A Did I buy that money order at the First National City Bank?

Q Yes.

A No, I did not buy it there. I bought it in some office. I don't remember where. I think in a cash--in a check-cashing place.

I'm not sure.

Q I Don't understand, Ma'am. I didn't ask you where you cashed it. I asked you--

THE COURT: She said she thought she bought it in a check-cashing place.

Q Was it a POstal Money Order from the United States Post Office?

A I don't know. It was a money order. The money orders, you can buy them there,

It could be an American Express Money Order--I don't know. A money order. I don't remember what--

Q To the best of your recollection, that was in a check-cashing place?

A I cannot tell you for sure where I bought it. It could have been in an apothecary, a drug store or-I cannot remember.

Q In other words, then, I take it you haven't seen that money order in the possession of the FBI or the United States Attorney since you bought it, is that right?

A No, I didn't.

Q You haven't seen it since then?

A I did not.

Q What?

A No, I didn't see the money order.

When my counsel cross-examined another government witness, Ramirez, he was questioned as to whether I was a member of "Dare to Be Great." The witness said no at which point the government objected and the court sustained the objection. The witness admitted, that I was not associated with "Dare to Be Great," and the government objected, at this point sustained by the court. It can only be out of sheer stupidity that my counsel did not pursue this matter with the Court. The witness had a question put to him which he answered truthfully. The objection by the government was out of order and since my attorney, was not qualified as a good cross-examiner, did not pick up this error. Based on this incompetence of Mr. Friedman, it was wrongly established that I could have been a member of "Dare to Be Great," since the question put to the

witness was sustained. Again, in the transcript 68 A (Tr. 163, line 24-166, line 2), as cited below, it shows that upon questioning, the witness stated that I was an accountant.

Q Do you know whether Mr. Nisnewitz is in any way connected with Dare to Be Great?

A At some meetings, I spoke to other people who were involved in the company.

Q And they mentioned Mr. Nisnewitz?

A Yes.

Q But he was not mentioned as a principal, was he?

A Excuse me?

Q He was not a principal in Dare to be Great?

A No, he was not.

MS. HYNES: Objection, your Honor.

THE COURT: I will sustain the objection.

Q Do you know the reason that the bank turned you down, the first bank, Kings Lafayette?

A I didn't qualify for a loan.

Q After being rejected, did you speak to the loan officer about it?

A No, I didn't. I didn't speak to him why I was declined.

Q Never asked him?

A Not that I recall, no.

Q On that application, did you put down your true age?

A Of course.

Q How old were you then?

A I am 23 right now.

Q How old were you in 1970, 20?

A I think so, yes, 20 years old.

Q Did you put down you were 20 years of age?

A Yes.

Q Did you put down how much money you were earning in Cadillac Motors?

A Everything was true in that statement.

Q Everything was true?

A Everything was true in that statement.

Q I believe you testified that after you got Mr. Nisnewitz' name from this Dave, you telephoned him for an appointment?

A Right.

Q During this telephone conversation, I believe it was your testimony that you told him you wanted the loan, and he said it would cost you \$150?

A Exactly.

Q This is what happened on the telephone?

A On the telephone call the first time we spoke.

Q Had you ever spoken to Mr. Nisnewitz before?

A No.

Q You knew Mr. Nisnewitz was an accountant, didn't you?

A From what I was told by other people from the corporation, yes, he was.

Further, while again cross-examining government witness, Ramirez, my attorney incorrectly used a government exhibit submitted in evidence which in effect was detrimental to my defense. Mr. Friedman told the witness to refer to a particular exhibit and page number. Counsel for the co-defendant made a correction as to which exhibit was being referred to. Mr. Friedman continued to question the witness about the statement when the witness responded to what he was being questioned about and mentioned the name of another banker (Ramos) not Westphal, which Mr. Friedman was questioning the witness about. 72 A (Tr. 183, line 14-185, line 3)

Q I refer you to the first page of the April 7th statement to the FBI, marked as Defendant Nisnewitz Exhibit A.

MR. DRESCHER: Wasn't that B for identification?

THE COURT: It is B for identification.

MS. HYNES: What page, 7?

MR. FRIEDMAN: I think it is the fifth page.

Q I ask you to look at the paragraph starting "I called Nisnewitz and told him"--

A Yes, I read the paragraph.

Q Does that refresh your recollection whether you called Mr. Westphal back?

A No, you got the wrong story here. This is about Mr. Ramos. This is in reference to-

THE COURT: You must have the wrong page.

A I got page 5.

Q Page 5, the paragraph starting "I called Mr. Nisnewitz"--

THE COURT: Hold on, Mr. Friedman.

I I think he wants you to address yourself to that paragraph (indicating-).

A Yes, I guess that's true, that did happen. I did call back.

Q You had to call Mr. Westphal back in a couple of days, is that correct?

A When I called him the first time, he told me my loan was declined.

Q Then you spoke to Mr. Nisnewitz and Mr. Nisnewitz asked you to call Mr. Westphal, and you called him back, and Mr. Westphal told you to call him again in two days?

A Exactly.

Q And when you called Mr. Westphal back, he told you that he would give you the loan if you would give him a co-signer?

A Exactly right. Now it is coming to me, I told him no, that I did not want to get no other people involved in my business.

This instance of cross-examination shows how unprepared Mr. Friedman

was during the trial proceedings. Mr. Friedman did not know what was contained in the evidence submitted by the government. It went as far as a government witness-Ramirez, under cross-examination, by Mr. Friedman bringing up information that the statement to which counsel asked him to refer to did not concern the banker to whom he was questioning the witness. This line of questioning showed that counsel, because of his incompetency, brought into the record a line of testimony which ultimately became prejudicial and detrimental to me as it may have established the conspiracy alleged in the indictment between myself and the banker, Ramos, who had previously plead guilty and testified for the government.

Previously in this affidavit I mentioned, in reference to the voucher submitted by counsel, his lack of preparation before and during my trial. I am cognizant now that the District Court saw through this incompetency and reduced his fee because of lack of preparation, among other things.

When counsel cross-examined the witness Ramirez, he led the witness into testimony as to a W-2 form which he alleged was forged by myself. The W-2 form was brought up by the witness, improperly answering a question put to him by my attorney. My counsel did not restrain the witness for instituting into the record matters which he was not asked of and ultimately was used against me by the government. In fact, the witness used a term, "forged" which added insult to injury. In effect, my attorney in questioning the witness in a manner which is akin to prosecuting me instead of defending me. In substance, as seen from the trial transcript, my attorney is helping the government to obtain my conviction. 75 A (Tr. 195, line 4-23).

Q He told you to give Mr. Ramos the second application?

A Right. He also gave me a form.

Q We will get to that. The W-2 form.

A Right, the W-2 form.

Q When you got to Mr. Nisnewitz' office, where was this application?

A Where was it? It was--he was folding it and putting it into the envelope.

Q And you saw him seal the envelope?

A Yes.

Q Was anything written on the envelope?

A Mr. Ramos, First National City Bank.

Q Did you not see this application?

A No, I did not see the application.

Q I believe you testified that at that time Mr. Nisnewitz was typing up a W-2 form?

Q A Right.

Q Did you see the W-2 form?

A That's when I realized that it was forged.

My question, relevant to this point is, whose side was my eloquent attorney on? I would naturally assume that he would be on my side. In effect, what happened in the pursuance of my defense, he hurt me more than he helped me.

Again, with respect to counsel and his lack of knowledge of cross-examination of the government witness, Ramirez 76 A (Tr. 199, line 6-200, line 6), while cross-examining said witness he made a derogatory statement which my attorney should have not allowed to continue. Especially with respect to an answer on lines 14-15, page 199, as follows: "That's when I looked it over clearly and that's when I noticed there was alot of false statements in it."

Q When you went to the bank--the First National City Bank with this second application, you had a conversation with Mr. Ramos?

A Right.

Q And Mr. Ramos let you see the application?

A Exactly.

A That's when I looked it over clearly and that's when I noticed there was a lot of false statements in it.

Q While you looked it over, did you fill in any parts of the application such as the purpose of the loan?

A Yes, I did.

Q Did you put down your previous address as 60 Gouverneur Street, New York City?

A Yes, I did.

Q Did you put in your supervisor's name as Mr. Skennion?

A Yes, I did.

Q These were all put in there in your handwriting?

A Yes, I did.

Q And then you signed this application?

A Yes, I did.

Q Knowing that the information was false?

A Right. Exactly.

This again substantiates my belief and contention that my attorney did more to aid in my prosecution than in my defense. He allowed a derogatory statement into the record without nullifying it. This shows that a competent cross-examiner of witnesses would not promulgate a conviction as he did.

Finally, as if the aforementioned were not detrimental enough to my defense to show that counsel was so incompetent, the learned judge could not understand the significance of the cross-examination of the rambling government witness, Rodriguez and asked the attorneys to the side bar. 78 A (tr. 242, line 5, 245 line 28).

Q You testified at that time, Mr. Rodriguez, that you went to a few meetings and it was always the same thing, the same faces.

A That's right.

Q Were any of those faces Mr. Nisnewitz' face?

A No.

Q Then you told the grand jury that "this guy, the one who told , Benjamin Martinez"?

A I didn't know his last name.

Q Martinez is the words you used. You did not know his last name?

A Well, I didn't remember it now.

Q Did you know Mr. Martinez well?

A No.

Q You told the grand jury that Mr. Martinez wanted you to go into a distributorship with him?

A No. I mean Benny--one day I was going to the store, the grocery store, and he stopped me in the street, and he told me about, you know, how I would like to make a lot of money. So I asked him, you know, "What is it that I have to do?" He says, "You got to sell."

So I says, "Sell what?"

He says, "Well, I can't tell you that, You have to come to a meeting."

So I asked him, well, you know, "What is it? What's rhis meeting all about?"

He says, "Well, I can't tell you because if I tell you, it may turn you off and you may not want to come."

So I asked him, you know, "What is it I have to sell, drugs?"

He said, "No, it is not like that."

And he said--I said, "Well, you know"--again, I kept asking him, trying to insist on him telling me whatatype of meeting that is, and he says, "Listen, just come to the meeting, it is the opportunity of your lifetime. Once you get involved in what I am going to

present to you, you are going to be rich. You will make it, and you are definitely going to go places. You are not going to even worry about welfare."

And I says, "Okay, I am going to go."

So that night they pick me up and he came with a guy named Filande, and I went to that meeting on 57th Street.

THE COURT: Just a minute. Let me stop you.

Would you gentlemen and ladies please come to the side bar?

(At the side bar.)

THE COURT: I want to make this observation. This witness is rambling on in a conversation with all sorts of people, in a completely unresponsive answer to a question of yours, Mr. Friedman.

You have made no request of me to cut him off.

MR. FRIEDMAN: No, sir.

THE COURT: And you, Mr. Drescher, have made no request of me to cut him off, nor has the government, and if I don't hear a request of that kind, I am not going to do it.

MR. DRESCHER: I understand your Honor's position.

THE COURT: But it seems to me that all counsel here is leaving open the possibility of all kinds of mischief coming into this record in this conversation, and I don't want anybody to feel that I am supposed to be the one here to terminate this in the absence of anybody saying anything to me.

MR. LAWYER: The government will protect its own record when it feels necessary.

THE COURT: I just want to make it perfectly clear to you gentlemen that I feel that the witness is on a frolic of his own on an unresponsive answer. I will look to you to ask for a ruling.

Otherwise, I am not going to do anything.

MR. DRESCHER: I don't know him and I won't even question him.

If anybody asks me, I love him.

THE COURT: All I can say is that this is the kind of conversation that I can see could--

MR. DRESCHER: It will end up nowhere.

THE COURT: It could open alot of doors and it could also end up nowhere.

MR. FRIEDMAN: I think it will end up nowhere.

THE COURT: I just want to make it perfectly clear that I am looking to you to turn it off if you do not desire it. (emphasis added)

As can be seen from the aforementioned excerpt, it is my contention that what ensued was practically an education by the court intended for the edification of Mr. Friedman, my attorney as to the effects of this cross-examination of the witness and his client's future defense. As the court said, "it could open alot of doors and it could also end up nowhere." (page 245 lines 13-14). The court was inferring that the continued rambling of this witness, under the so-called cross-examination of counsel, would bring about a dangerous and detrimental outcome to my defense. The witness, in rambling, was mentioning drugs, not seeming to know what he is saying, indirectly admitting to being on welfare, etc. He is allowed to continue, as Mr. Friedman says, regarding the possible outcome from this testimony, "I think it will end up nowhere." (Tr. 245 line 15).

The bad feature of this cross-examination by my counsel of Rodrigues is that the jury heard the ramblings of this witness and as the court inferred, it could lead to "mischief." I submit that the jury, upon hearing these remarks, could deduce that I was involved in unrelated matters by the manner in which counsel was conducting his cross-

examination, by allowing the witness to continue to make such prejudicial statements. This part of this cross-examination illustrates beyond any reasonable, possible doubt, how counsel of mine could not cross-examine witnesses and in fact, his cross-examination led the witness to enter into the record, remarks that were detrimental to my defense. Most of all, into the minds of the jurors, statements became prejudicial and I contend, a decent, competent attorney would never let himself be a part of such a catastrophe.

In Moore v. United States, 432 F. 2nd 730, 737 (3 cir. 1970), the court stated that:

"It is possible to examine the sufficiency of his preparation and the adequacy of his knowledge of the relevant law."

"It has been said that a claim that the defendant was denied due process of law requires a showing that counsel's representation was 'so lacking in competency or good faith that it would become the duty of the trial judge or the prosecutor as officers of the state to observe and correct it. For in such a trial the defendant would be practically without representation and it would therefore be a farce and a mockery of justice. U.S. ex rel Dancy v. Hardy 203, F. 2nd, 407, 427 (3 cir. 1953)" (emphasis added).

As evident in Moore, the District Court in the case at bar, recognized the incompetence of counsel and went as far as to look to Mr. Friedman and more than suggested to do something, stop the witness "to turn it off."

Further proof of the incompetence of my attorney was that of him not objecting or taking any action as to a statement made by co-defendant's counsel, Henry A. Drescher, Esquire. In his summation to the jury, Drescher said the following: 87 A (Tr. 786, line 9-21).

MR. DRESCHER: If your honor please, my friends at the government's table, Mr. Friedman, Madam Foreman, ladies and gentlemen of this jury:

I may start off this way, in full sincerity, that this is the darndest case I have ever seen as far as it is a travesty as far as confusion, discrepancies, and contradiction, of all the witnesses. Apparently the only one who told the truth in this case was Mr. Ramos; when he took the stand and swore that he lied previously. That I assume the truth. Otherwise, you are going to have great trouble in deciding what the facts were in this case and I am going to discuss them with you at length later on (emphasis added)

In effect, being a witness myself, I was called by the co-defendant's counsel a liar for the purpose of taking any possibility that Mr. La Morte, the co-defendant committed any criminal acts out of the minds of the jurors. Since Mr. La Morte did not testify, this strategy could be used to discredit my testimony and credibility.

After my conviction, Mr. Friedman instructed me to report to the United State Probation Department for a pre-sentence investigation. The United States Probation Officer, Joseph Kahn, instructed me to get letters of recommendation and references from my clients, personal friends and members of the community on the pretext that I was seeking a new, large client.

Additionally, Mr. Kahn requested of me a statement, needed for the pre-sentence report of my involvement in the case and feelings as to my innocence or guilt. Being confused, I asked if I may take the blank form to Mr. Friedman, who I felt, since he was representing me, would give me the correct wording for this statement. This statement, 49 A prepared and dictated to me by counsel, in effect admits my guilt and then pleads ignorance of the law. Since at that time I did not feel one way or another about his competence or lack of it and since he was

representing me, I followed his instructions to the letter and wrote the statement in my own hand as he dictated it to me.

As to the statement itself it should never have been written, according to Mr. Brodsky, who later represented me at the sentencing before the District Court.

Upon sentencing the court used this statement as a basis for my incarceration. By the use of the statement and letters, the District Court could justify its actions. My attorney, knowing that I was going to appeal, should have contested the pre-sentence report by the Probation Department, especially as to the letters given them.

Mr. David Brodsky, Esquire, of the firm of Guggenheimer and Untermeyer, was appointed to represent me after a few communications with Judges Owen and Lasker and Gurfein, who were assigned to the two other indictments which were of the same nature. Judge Gurfein, upon receiving my letter 51 A assigned David Brodsky as my counsel in which Judge Owen concurred, but Judge Lasker refused to appoint new counsel 53 A. As evident in his letter, he expressed substantial confidence in the manner in which Mr. Friedman would defend me. However, Judge Lasker finally assented to my request and dismissed Mr. Friedman. As evident by this dismissal, Judge Lasker, who expressed confidence in Mr. Friedman, still dismissed him. If his Honor felt that Mr. Friedman would represent me in a competent manner, why then did he finally acquiesce to my request for dismissal of Mr. Friedman based upon my feelings of incompetency as stated in his chambers before the second trial commenced, and in my letters to him as per 54 A. There were other ramifications which showed continued incompetence of counsel. He never requested of me any information as to my health which, if inferior, would have been transmitted for the pre-sentence report. It just so happens that I had a low-back condition which has always caused a lot

of pain. It was only after the dismissal of Mr. Friedman did Mr. Brodsky attempt to rectify this situation. Unfortunately, the District Court felt that these reports 55 A were too late in forthcoming.

Mr. Brodsky attempted to correct my lack of competent counsel by suggesting that I obtain new letters attesting to my continued good standing in the community in the community even though said people of the community knew about my possible incarceration. Mr. Brodsky, in his notice of motion for a reduction of my sentence stated in his affidavit, "these letters would have been submitted to your Honor at the time of original sentencing if the defendant had been properly advised by his original attorney and the Probation Officer." (emphasis added).

The court, in *Candarella v. United States*, 375 F. 2nd 222, 230 (8 cir. 1967) stated that:

"The rule applicable is that a charge of adequate representation can prevail 'only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice shocking to the conscience of the court.' O'Mally v. U.S., 6 cir., 285 F. 2nd 733, 734."

I submit that in the case at bar the representation afforded me by Mr. Friedman amounted to a "farce and a mockery of justice."

Further, with respect to the failure of counsel to provide adequate representation and its relationship to the adversary system, the court in *Thomas v. Wyrick*, 535 F. 2nd 407, 413 (8 cir. 1976) stated that

As we have seen in *McQueen*, the failure of defense counsel to provide adequate assistance is a unique form of constitutional error. It creates a 'flaw in the adversary process,' *id.* at 218-219, not attributable to the fault of either the government or defendant, and it undermines the integrity of the trial process in which all parties have a vital interest."

Additionally, in *United States v. Easter*, 539 F. 2nd 663, 666 (8 cir. 1976), Judge Henley concurring, stated:

Today the court has announced that the standard established in our prior decisions is that trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." (emphasis added)

As the preceding excerpts of the transcript indicate, counsel could not conduct himself in a competent manner before, during and after trial. In short, I was afforded representation, but it was completely unaffffective. In McKenna v. Ellis, 280 F. 2nd, 529 599 (5 cir. 1960), the court stated that"

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. We consider undivided loyalty by appointed counsel to client as essential to due process." (emphasis added)

As evident from the above discussion of counsel's performance during trial Mac Kenna cannot be taken lightly.

Based upon the aforementioned, the decision of the District Court should be reversed and the case at bar remanded back to the court.

POINT III

THE DISTRICT COURT ERRED WHEN IT HELD THIS
APPLICATION TO BE

A) Untimely As The Application Was Made Within
The Time Period Required By Law

The motion for a new trial was timely as it was made within the
required time of two (2) years after final judgment. Rule 33 provides
that:

"The court on motion of a defendant may grant a new trial to
him if required in the interest of justice... A motion for a
new trial based on the ground of newly discovered evidence may
be made only before or within two (2) years after final judgment...
(Emphasis added).

B) Further, the Claim That The Defendant Had Served His Sentence, Thus The Motion Being Untimely Is In Error, As The Defendant Is Presently Serving A Five-Year Period Of Probation and Is Still Serving A Sentence.

The District Court erred when it denied the motion for new trial as untimely by virtue of the fact that the court claimed the defendant had served his sentence. A sentence as defined by the Law Dictionary, by Steven H. Gifis, holds that a

"Sentence, the punishment ordered by a court to be inflicted upon a person convicted of a crime, usually either a non-custodial sentence such as probation and/or a fine, or a custodial sentence such as a term of years of imprisonment or a number of months in a county jail. (emphasis added).

The holding by the court was wrong as I had only served my prison sentence but I am presently serving a period of five years probation. The sentence, originally handed down by the court is as follows 9 A

"One year and one day on each of counts 1 thru 6, to run concurrently. One year and one day on count 7, to run consecutively with sentence imposed on Counts 1 thru 6. Execution on count 7 is suspended, and on that count defendant is placed on probation for a period of five (5) years, to commence upon expiration of sentence imposed on counts 1 thru 6. (emphasis added).

I served my sentence of imprisonment which the court imposed and at the present time I am still serving a sentence by virtue of the fact that I am on probation. I am serving what is termed a "non-custodial sentence," but I am subject to incarceration should I violate any conditions of my probation.

Title 18 USCA §3651, provides that

"The court may revoke or modify and condition of probation or may change the period of probation. " (emphasis added).

The key element here with respect to the sentence imposed by the District Court is that the "execution" of the sentence on the seventh count was "suspended." While the execution of the sentence was suspended, it was done so subject to my following the condition of probation imposed by the court. In *Berman v. United States*, 302 U.S. 211, 212, 213 (1937), the Supreme Court was faced with an almost identical situation as the case at bar. Mr. Chief Justice Hughes speaking for the Court stated that:

"Here, the imposition of the sentence was not suspended but only its execution. The sentence was not vacated. It stands as a final determination of the merits of the criminal charges. To create finality it was necessary that the petitioner's conviction should be followed by sentence (*Hill v. United States*, supra), but when so followed the finality of judgment was not lost because execution was suspended." (emphasis added).

"Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment."

Further

"Placing petitioner upon probation does not affect the finality of the judgment. Probation is concerned with rehabilitation, not with the determination of guilt,"

In *Nix v. United States*, 131 F. 2nd., 857, 858 (5 cir. 1942), with respect to probation, the Court held that

"Probation does not aside the judgment of conviction but it self involves a judgment of conviction, even when the imposition of sentence is suspended, because probation can only be visited on a convict and is itself a form of mild punishment *Cooper v. United States*, 5 cir., 91 2nd., 195..." (emphasis added)

In *Cooper v. United States*, 91 F. 2nd, 195, 199 (5 cir. 1937) the court stated that

"It (probation) is an authorized made of mild and ambulatory punishment, the probation being intended as a reforming discipline, the probationer is not a free man, but is subject to surveillance, and to such restriction as the court may impose." (emphasis added).

In addition, numerous other cases advance the same point as mentioned above. See also: Dillingham v. United States, 76 F. 2nd., 35, 36 (5 cir. 1935), United States v. Koppelman, 53 F. Supp. 499, 500, 501 (USDC, Md. Penn. 1943), United States v. Markovich, 348, F 2nd., 238, 239, 240, 241 (2 cir. 1965) and Gillespie v. Hunter, 159, F 2nd. 410, 412, (10 cir. 1947).

As the above mentioned discussion states and indicated, by virtue of being on probation, I am still serving a criminal sentence.

Based upon the aforementioned, the decision of the District Court should be reversed and the case at bar remanded back to the District Court.

POINT IV

THE DISTRICT COURT ERRED BY NOT GIVING
THIS MOTION THE REQUIRED CONSIDERATION
AND DUE DELIBERATION

A) The Court Should Have Granted A Hearing Before
Ruling On The Motion

The District Court when it denied the motion for a new trial without granting a hearing. Based on the information presented to the court in the motion a hearing should have been granted and the court should have used additional discretion which is available to it when ruling upon such a motion. Further, when the court denied the motion, an opinion describing the reasons at length as to why the motion was denied should have been granted instead of a short memorandum 58 A.

In United States v. Clark, et al, 19 F. Supp., 972, 973 (DC. WD Missouri, WD 1937) the court said with respect to the duty of the trial judge:

"I conceive it to be the duty of the trial judge, when a motion for a new trial is filed in a criminal case (or, for that matter, in any case,) to prepare and file a memorandum of the reasons for his action on the motion. He owes that duty not only to the parties, but even more he owes it to the judges of the reviewing court or courts. Appellate Judges sometimes are aided (at least their time is saved) by statement of reasons for rulings made in the court below).

With respect to the amount of discretion available to the trial judge when declining upon a motion for new trial, the court stated in Jones, v. United States, 279 F. 2nd., 433, 436 (4 cir. 1960), that

"This remedial procedure, a motion for a new trial based upon after discovered evidence is desired to serve the ends of justice. It is made available as a means of relief from

manifest justice. That purpose would hardly be served if the law requires the trial judge, who heard all the evidence and saw all the witnesses to assume that a jury would believe testimonial evidence however improbable and unworthy of belief he finds it to be. If the purpose of the remedy is to be served, without subjecting it to undue abuse, the trial judge who approaches the question of the probable effect of the new evidence upon the result, in the event of a new trial, should be vested with a broad discretion in considering matters of credibility as well as well as of materiality. Stringent or artificial limitations upon the exercise of the discretionary power of the trial judge to grant new trials could only subvert the purpose of the remedy. " (emphasis added)

See also United States v. Miller, 277 F. Supp., 200, 209 (1967), Brown v. United States, 333 F. 2nd., 723, 724 (2 cir. 1964), United States v. Rutkin, 208, F. 2nd., 647, 654 (3 cir. 1953) and United States ex rel Carmelo v. Burke, 172, F. 2nd., 213, 216 (3 cir. 1947).

Judge Owen, who presided at the trial, viewed the entire matter from a first-hand basis. He heard all the witnesses give testimony and saw all documentary evidence which was submitted plus witnessed the manner in which my appointed counsel represented. Based upon all the inconsistencies mentioned and the fact that he viewed all events which were brought out in the motion for a new trial, a hearing should have been granted before the court ruled on the motion.

In Prilla v. United States, 279 F. 2nd., 407, 408 (9 cir. 1960) the court stated with respect to a review of a denial for a motion for new trial and the discretion exercised by the District Court that

"We cannot interfere with that discretion unless it can be said to have been abused. " (emphasis added).

Further, in United States v. Bujese, 371 F. 2nd., 120, 124, 125 (3 cir. 1967), the court stated that:

"It is settled that the granting or refusal of a new trial rests in the discretion of the trial judge and the function of an appellate court upon appeal from a denial of a motion for new trial is restricted to the inquiry whether the trial judge

abused his discretion or failed to exercise it, further that
'Where there is a grave question of the credibility of the after-
discovered evidence... the role of the trial judge is that of
the fact finder.'" (emphasis added).

In short, the District Court failed to exercise the discretion available to it when ruling upon such a motion. In such an instance, an appellate court is permitted to review the matter.

The importance of granting a hearing before ruling on the motion is an issue of paramount importance in the case at bar. The District Court, as evident in Bujese should have examined the evidence as that of a "fact finder" and looked at its credibility. But, most important of all, as stated in United States v. West, 170 D. Supp., 200, 204, 205 (USDC, N.D. Ohio, ed. 1959),

"The important thing is that the defendants have been given a
hearing on their motion and all their claims have been considered."

This was not the case, as the District Court did not grant a hearing and I submit was not able to adequately rule upon the motion.

Based upon the aforementioned and the failure of the District Court to give the motion due deliberation, consideration and grant a hearing, the decision of the District Court should be reversed and the case remanded back to the court.

CONCLUSION.

For reasons set forth in the above mentioned arguments, the decision of the District Court denying the motion for new trial should be reversed and the matter remanded back to the District Court.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1106

UNITED STATES OF AMERICA,

APPELLEE

V.

HAROLD NISNEWITZ,

APPELLANT

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE SOUTHERN

DISTRICT OF NEW YORK

APPELLANT NISNEWITZ, APPENDIX



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